

NO. 44998-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TYRONE EAGLESPEAKER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA
COUNTY

HONORABLE JUDGE BRIAN P. ALTMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly instruct the jury on the lesser degree crime of rape in the second degree where there was affirmative evidence that the defendant forcibly raped the victim but did not feloniously enter her residence, and therefore that the defendant did commit the crime of rape in the second degree, but not the crime of rape in the first degree, as charged?

2. Did the trial court abuse its discretion by allowing in evidence, under the "excited utterance" exception to the hearsay rule, a 9-1-1 call made by the victim, when the victim did testify at trial?

3. Did the trial court properly admit the defendant's statements to law enforcement where those statements were made prior to the defendant being put in custody, were not in response to interrogation, or were made subsequent to Miranda warnings being given, and where the defendant did not make an unequivocal request for an attorney?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On December 24 2012, the appellant, Tyrone Eaglespeaker, was charged by information with one count of Rape in the First

Degree and one count of Burglary in the First Degree. CP 1-3. He was arraigned on January 3, 2013 and entered a plea of Not Guilty. An amended information was filed on February 28, 2013, adding one count of Possession of a Controlled Substance and one count of Use of Drug Paraphernalia. CP 11 - 14. RP (February 28, 2013) 2.

A CrR 3.5 hearing was held on March 28, 2013. CP 108 – 117. RP (March 28, 2013) 5-68. At the conclusion of the hearing, the defendant agreed that his statements to law enforcement (prior to being formally arrested and taken to jail) should be admitted under CrR 3.5. RP (March 28, 2013) 65-66. The Court ruled that Eaglespeaker's statements to law enforcement were admissible at trial. CP 114 - 117. RP (March 28, 2013) 84.

A jury trial was held on May 13-15, 2013. RP (May 13, 2013, May 14, 2013, May 15, 2013). The jury returned verdicts of Not Guilty as to Count One (Rape in the First Degree), Guilty as to the lesser included offense of Count I (Rape in the Second Degree), Not Guilty as to Count Two (Burglary in the First Degree), and Guilty as to Count Three (Possession of a Controlled Substance), and Guilty as to Count Four (Use of Drug Parapernalia). CP 103 – 107. RP (May 15, 2013) 3 - 4.

Mr. Eaglespeaker was sentenced on June 13, 2013 within the standard range, CP 118 – 136. RP (June 13, 2013) 7. On May 1, 2014, the State stipulated that an error had been made in calculating Mr. Eaglespeaker's offender score and he was re-sentenced within the corrected standard range.

2. SUBSTANTIVE FACTS

Julie Ricciardi, 25 years old, lived in North Bonneville, Skamania County, Washington since October 2012, with her boyfriend Scott Ekman and three small children. RP (May 14, 2013) 22-23. The defendant, Tyrone Eaglespeaker, was the boyfriend of Nicole Nash, a friend of Ricciardi's. RP (May 14, 2013) 24.

After October 2012, Eaglespeaker "started to come around more often to hang out with Scott [Ekman]." RP (May 14, 2013) 24. Eaglespeaker and Nash lived together in North Bonneville, Skamania County, Washington, less than a half-mile from Ricciardi and Ekman. RP (May 14, 2013) 24-25. Eaglespeaker and Nash came over to Ricciardi's and Ekman's place together "a lot", RP (May 14, 2013) 25.

Ekman was incarcerated from December 5, 2012 through January 6, 2013, leaving Ricciardi at home alone with her three children, other than one week when Ekman's sister was visiting.

RP (May 14, 2013) 28-29. Nash was out of town in late December 2012, leaving Eaglespeaker living at her place in North Bonneville.

RP (May 14, 2013) 29. During this period of time, Eaglespeaker "made passes" at Ricciardi, to which Ricciardi made it clear she was not interested. RP (May 14, 2013) 45-46.

While Ekman was incarcerated, Ricciardi let Eaglespeaker borrow Ekman's cell phone, keeping her own cell phone for herself. RP (May 14, 2013) RP (May 14, 2013) 30-31. On the evening of December 19, 2012, Ricciardi engaged in a dialogue by cell phone with Eaglespeaker, the latter using Ekman's borrowed phone. RP (May 14, 2013) 33. In the dialog, Ricciardi was arranging for Eaglespeaker to arrive at her home to help sell Ekman's truck canopy, which Ekman no longer wanted. RP (May 14, 2013) 33-35.

Later on, Ekman called Ricciardi from prison, and the two of them "got into a really, really bad argument," RP (May 14, 2013) 36. During that argument, Eaglespeaker came over to Ricciardi's home "a couple times," but when Ricciardi answered the door, Eaglespeaker realized he and Ekman were still arguing, so he left. RP (May 14, 2013) 36. Ricciardi later texted Eaglespeaker, "I feel

like throwing up," because she was so upset with Ekman. RP (May 14, 2013) 36-37.

Ricciardi then texted Eaglespeaker, "Why are you ignoring me?" because he had come over while she was arguing with Ekman "obviously to say something" but then would not respond to her text. RP (May 14, 2013) 37. Eaglespeaker responded with, "I'm waking up, U up, sorry?" but later corrects that to, "I just woke up. I'll be over in a few." RP 37-38.

The dialog continued with Eaglespeaker texting, "Do you miss me?" RP (May 14, 2013) 38. Ricciardi, feeling the comment was inappropriate when both of them had significant others and feeling there was no reason to miss him since she had "just seen him a few hours before," responded, "How is Nikki doing?" referring to Eaglespeaker's girl-friend. RP (May 14, 2013) 38. Eaglespeaker responded, "I don't know why that you always have to talk shit." RP (May 14, 2013) 38.

Eaglespeaker continued with a question, "How's Scott [Ekman] and Kevin?" RP (May 14, 2013) 38. Kevin was another friend. RP (May 14, 2013) 39. Ricciardi replied that neither was doing well. RP (May 14, 2013) 39. She also wrote, "I'm over it. He [i.e., Ekman] wants to be with me for all the wrong reasons," based on

her just concluded argument with Ekman over the phone. RP (May 14, 2013) 39. Eaglespeaker asked if she meant Ekman or "Kevin," and Ricciardi clarified that she meant Ekman, replying, "It's 11 p.m. and my kids are still awake. I was only up the night before. Kevin's just a friend." RP (May 14, 2013) 40.

Ricciardi continued the conversation by texting, "You can go back to sleep if you want," RP (May 14, 2013) 40. Eaglespeaker responded with "I need to shower, WBU?" meaning "What about you?" RP (May 14, 2013) 40. Ricciardi responded, "Yeah, but I always wait until my kids are asleep." RP (May 14, 2013) 40. Eaglespeaker then replied, "Okay, well if you want me to come over then let me know." RP (May 14, 2013) 41. Thinking the conversation was getting to an inappropriate area, Ricciardi replied, "Sweet dreams," RP (May 14, 2013) 41. The conversation continued as follows:

Eaglespeaker: Yeah, don't let the meth bugs bite.

Ricciardi: What's up with you. You're either really nice or really mean, confusing.

Eaglespeaker: Really mean, but my album's incredible. Are you ready to hump?

Ricciardi: No, but at least now I know that's the only reason that you wanted to hang out, not surprising, happens a lot.

Eaglespeaker: Okay, you're such an ass. You make me feel like an animal or is it cuz I'm an Indian. Well call it what you want, that's what normal people do. To me it

seems there's no mutual attraction. You brush me and push me away, tease me. I'm man plus an addict, so you don't have to treat me like I'm being put through a test a time. I don't mean to want to fuck you but you are so attractive to me. Wish you felt like I did and not want me for the wrong reasons. I'm leaving your phone on your doorstep, I'm frustrated.

Ricciardi: Why does it have to revolve around sex? You're being stupid right now. You're totally tripping. Who cares if you're an addict, who isn't? WTF, I didn't do anything to deserve this. You're being a brat so if I don't fuck you then you don't want to hang out? Real mature, I didn't think you were that shallow. Wow, I can't fucking believe you."

Eaglespeaker: I'm not shallow. I'm a man who has hung out with you for days and get no affection or attention hardly so naturally I feel like I'm just a reject. I have never been so lonely in a long time and you and your patience style is driving me in such as I crazy. If I can't have it my way, I don't want it at all. That's just the way I am. I want you so bad. I waited for days to be stalled. Excuse me for naturally feeling this way. I'm just lonely and I have no real person to be my remedy. I'll be your friend but I'd rather waste my time elsewhere because I have blue balls. LOL [i.e. laughing out loud]

Ricciardi: I'm speechless basically if I don't fuck you I'm not worthy of being your friend. I deserve more respect than that and I won't expect anything less. You are being pretty shallow, shallow, shallow. I bet ugly girls don't have to worry about people pretending to care just because they want to fuck. Waste your time elsewhere if want. I won't be my loss, that's for damn sure.

RP (May 14, 2013) 41-44.

After a gap of time, Eaglespeaker again texted Ricciardi, "You up still?" to which Ricciardi replied, "Yep, kids just fell asleep."

RP (May 14, 2013) 44-45. After this, Ricciardi herself fell asleep in

her bedroom (the master bedroom) at around 3:30 AM (on December 20, 2012). RP (May 14, 2013) 46.

The next thing Ricciardi knew, Eaglespeaker "was standing about two feet into the doorway of the master bedroom," maybe a foot away from Ricciardi's bed. RP (May 14, 2013) 47-48.

Ricciardi was still laying on her bed. RP (May 14, 2013) 47.

Ricciardi had not given him permission to enter, but she could not recall if she had locked the back door. RP (May 14, 2013) 48.

Eaglespeaker then forced himself on top of Ricciardi, holding her down "diagonally" with one arm while he took his other hand and tried to unbutton her pants. RP (May 14, 2013) 49. Ricciardi

repeatedly told Eaglespeaker to stop and that she didn't want "to do this," and resisted his attempts to force himself on her. RP (May

14, 2013) 49 - 54. Ricciardi resisted by trying to push

Eaglespeaker off her, and kicked her legs, but couldn't overcome

Eaglespeaker as he would just use more force, the more she

resisted. RP (May 14, 2013) 50 - 53. Eaglespeaker was able to

get his hand into Ricciardi's pants and penetrate her vagina with his fingers. RP (May 14, 2013) 54 - 55. The penetration lasted for a

couple minutes when Eaglespeaker suddenly stopped and got up,

and left. RP (May 14, 2013) 55 - 56.

Ricciardi got up and locked the door after Eaglespeaker left the residence. Her 6 month old child had woken up and she took care of the baby, estimating that Eaglespeaker left at about 6:15 AM. RP (May 14, 2013) 55 - 56. Ricciardi was scared, but didn't immediately call the police because she had used drugs recently and was concerned about CPS. She did not initially think that Eaglespeaker would return. RP (May 14, 2013) 57 - 59.

Ricciardi acknowledged that it was not unusual for Eaglespeaker to come to her residence and did not recall if she'd locked her door the night of 12/19/12 or not. RP (May 14, 2013) 93 - 94.

Eaglespeaker returned to Ricciardi's residence about 4 – 5 hours later, asking to borrow her car and offering to pick up baby formula for her. RP (May 14, 2013) 59 - 61. Ricciardi was shocked that he had returned and told him to take the car, not wanting him to be near her. RP (May 14, 2013) 60 - 64. When Eaglespeaker left, Ricciardi attempted to tell a friend what had occurred, and ended up telling an acquaintance, Ruanna Johnson. RP (May 14, 2013) 64. She also showed Ruanna Johnson the text messages from Eaglespeaker from that night (before). RP (May 14, 2013) 65. Ricciardi believed that Ruanna Johnson and her friend Nicki would

kick Eaglespeaker out of Nicki's home, so he'd have to leave North Bonneville. RP (May 14, 2013) 65 - 67.

Ricciardi received another text message from Eaglepeaker later in the afternoon on December 20th, 2013, while he was still using her car. The text message said: "Okay, I just feel like I violated you, sorry, no drama. It's not easy to be on this elevator up and down, down, down." RP (May 14, 2013) 67. Ricciardi and Eaglespeaker sent several other texts back and forth the evening of December 20th, as Ricciardi did not want Eaglespeaker to know that she'd told anyone about what he'd done to her the night before. RP (May 14, 2013) 68 - 70. Eaglespeaker made several voice calls to Ricciardi on the evening of December 20th, also. After returning to Nicki's house and finding out that Ruanna Johnson was attempting to make him leave the residence, he called Ricciardi and told her if she didn't tell Ruanna Johnson that Ricciardi was lying, that he'd call CPS and other threats. He made repeated phone calls about those threats and sounded angry. RP (May 14, 2013) 70 - 72, 73 - 74. Later on he called again, while Ruanna Johnson was at Ricciardi's residence, and asked if he could stay at Ricciardi's house because Nicki was kicking him out. When Ricciardi told him that he couldn't stay, after what he'd done to her,

Eaglespeaker responded that it wasn't that bad, and that it hadn't gone that far. RP (May 14, 2013) 73.

Nicole (Nikki) Nash spoke to Ricciardi, Ruanna Johnson, and Eaglespeaker between 12/19/12 and 12/21/12. She initially withdrew her permission for Eaglespeaker to stay at her home, but then later agreed to let him stay, in the span of one night. RP (May 13, 2013) 135 – 136.

Ricciardi had a friend, Randy Pies stay at her house that night to help protect her in case Eaglespeaker tried to return. RP (May 14, 2013) 75. The next morning Ricciardi learned from Ruanna Johnson that Nicki was not going to make Eaglespeaker leave. Ruanna Johnson suggested Ricciardi call the police, which she did. RP (May 14, 2013) 75 - 76.

Ruanna Johnson overheard a conversation between Julie Ricciardi and Eaglespeaker on 12/20/13, the night before Ricciardi called 9-1-1 and reported the rape. Johnson described the conversation:

She put her phone speaker phone and she said "what do you want Tyrone?" and then he's all "why you talkin' to me like that?" and then she said "why, you know why" and then he's all "I didn't do nothin' that

bad,” and then she said “you call ripping off my pants while I’m screaming no, not that bad?” and he’s all “No, that wasn’t that bad.” RP (May 13, 2013) 143.

Johnson also overheard and described a second conversation:

“I overheard the phone call where he was telling her to call me and tell me she was lying or else he was gonna call the cops and have her kids took away.” RP (May 13, 2013) 149.

Johnson described Ricciardi as “frantic” and “hysterical” around that time, and encouraged her to call the police if she was scared. RP (May 13, 2013) 143 – 148. Ruanna Johnson tried, at Nicole Nash’s direction, to get Eaglespeaker to leave Nash’s residence, but Nash changed her mind the morning of 12/21/12, and Johnson told Ricciardi that he was still there. RP (May 13, 2013) 144 – 145.

When she realized there was no longer anyone protecting her from a return by Eaglespeaker, Ricciardi called 9-1-1. The fear and trauma that resulted from the previous night’s rape made her hysterical and hard to understand on the phone call. RP (May 14, 2013) 76 - 79. She reported to the Skamania County Sheriff’s Office what Eaglespeaker had done to her the previous night and

the threats he'd made to get her not to report them. RP (May 14, 2013) 78 - 79.

Deputy Christian Lyle responded initially to the call. RP (May 14, 2013) 79. RP (May 13, 2013) 25 – 27, 65. Ricciardi was hysterical and emotional, crying and was very difficult to understand, but eventually, with Deputy Lyle's assistance after his arrival, calmed down. RP (May 13, 2013) 65 – 66. Ricciardi told Lyle what happened, and showed Lyle several articles belonging to Eaglespeaker. RP (May 13, 2013) 68 – 70. Deputy Lyle also photographed a series of text messages sent to Ricciardi's phone by Eaglespeaker. RP (May 13, 2013) 71 – 72.

Detective Tim Garrity also responded and spoke with Ricciardi and took a recorded statement from her. RP (May 13, 2013) 29 - 30. After taking a statement, Detective Garrity contacted Eaglespeaker at the residence he was staying at and spoke to him briefly. RP (May 13, 2013) 38 – 41. Deputy Gary Manning had read Mr. Eaglespeaker Miranda warnings. RP (May 13, 2013) 37. Eaglespeaker denied having any sexual contact with Ricciardi, but admitted that he went to her residence on occasion. He claimed that Ricciardi had propositioned him about taking a shower together, but that he'd rejected her and told her off because he was

engaged to another woman (Nicki Nash). He also said he wouldn't want to have sex with Ricciardi because she'd just had a child and suggested that he found that disgusting. RP (May 13, 2013) 38 - 40. Eaglespeaker told Garrity that he didn't like going to Ricciardi's because he found her kids annoying, but he only went there to borrow her car. He also told Garrity that Ricciardi was a drug user. RP (May 13, 2013) 40.

Garrity questioned Eaglespeaker about his phone and was directed into another room to check it. In that room Garrity discovered methamphetamine. RP (May 13, 2013) 41 - 50.

On 12/21/12, Deputy Gary Manning was the first person to contact Eaglespeaker when he responded to an incomplete 9-1-1 call from another residence in North Bonneville, WA. He contacted Eaglespeaker during a protective sweep of the residence the call came from. RP (May 13, 2013) 100. Mr. Eaglespeaker was initially detained for officer safety by Deputy Manning during the sweep of the residence and placed in handcuffs, but was not arrested. RP (May 13, 2013) 101 – 102. Eaglespeaker eventually acknowledged having called 9-1-1. RP (May 13, 2013) 102 – 103.

After he was arrested, Eaglespeaker made a request to speak with a deputy. RP (May 14, 2013) 105. Deputy Mike Hepner

contacted Eaglespeaker while he was at the jail. Deputy Hepner did not know why Eaglespeaker was being held in the jail. He contacted Eaglespeaker at his "pod" and then walked with him to the booking area to talk. RP (May 14, 2013) 106. Eaglespeaker initially told Deputy Hepner that he wanted to "work off" his charges. When Deputy Hepner explained that he didn't even know why Eaglespeaker was incarcerated, Eaglespeaker explained: "well, I'm in here for rape, but I didn't rape anyone, I finger banged her." He made a gesture of his finger going into his fist. RP (May 14, 2013) 107 - 108. Eaglespeaker claimed to Deputy Hepner that at first Ricciardi answered the door naked and asked him to have sex with her. He claimed that he refused, because he had a girlfriend, but agreed to "finger bang" her. After finger banging her, he left, but decided that he wanted to have sex with her, so returned and asked her to have sex with him, and she refused. Eaglespeaker claimed to Hepner that she did want Eaglespeaker to take a shower with her (the second time he went over), but that he was only interested in sex, so he left. RP (May 14, 2013) 108 - 109.

At trial, Ricciardi admitted that she'd previously lied to a grand jury. She explained that she lied to protect her ex-husband, who was accused of felony unlawful use of a weapon. She

explained that she denied that he'd ever tried to stab her with a knife. She described her life at the time as involving "very bad" domestic violence, and that she was still living with her ex-husband at the time and feared him. RP (May 14, 2013) 80 – 81.

C. ARGUMENT

1. ALL REFERENCES TO AND ARGUMENTS BASED UPON DOCUMENTS OR FACTS NOT CONTAINED IN THE APPELLATE COURT RECORD MUST BE DISREGARDED BY THIS COURT.

The composition of the record on appeal is limited by RAP 9.1(a) to a report of the trial court proceedings, the papers filed with the Superior Court Clerk, and any exhibits admitted in the trial court proceedings. State v. Hughes, 106 Wn.2d 176, 206, 720 P.2d 838 (1986). Matters referred to in a brief or motion but not included in the record cannot be considered on appeal. State v. Stevenson, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977). When a party refers to matters in a brief that are not included in the record, the error should be brought to the appellate court's attention in a responsive pleading. Engstrom v. Goodman, 166 Wn. App. 905, 909 n. 2, 271 P.3d 959, *review denied*, 175 Wn.2d 1004 (2012) (" So long as there is an

opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike.").

In his statement of the case and throughout the brief, defendant repeatedly makes reference to a "false rape allegation" purportedly made by the victim prior to the instant rape. This claim was never before the trial court. In fact, the defendant's brief contains no citation to the clerk's papers, the verbatim report of proceedings, or any exhibit that is part of the record on appeal as evidence that the victim ever made a prior rape allegation. The record also contains no evidence of the falsity of the alleged prior rape allegation.

Here, the defendant unfairly attempts to undermine the victim's credibility with an extra-record irrelevant claim. See State v. Demos, 94 Wn.2d 733, 619 P.2d 968 (1980) (defendant is barred from questioning victim about prior rape complaints when the defendant lacks concrete, admissible evidence that the complaints were false); State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (same). The defendant's conduct is contrary to article I, section 35 of the Washington constitution, which mandates that victims be accorded "due dignity and respect" in the criminal justice system. Defense counsel's blatant violation of the rules of

appellate procedure by inserting this irrelevant and allegation violates RPC 4.3(a). The State respectfully suggests that this Court may wish to exercise its discretion pursuant to RAP 10.7 and order appellant's counsel to write a letter of apology to the victim.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LESSER DEGREE CRIME OF RAPE IN THE SECOND DEGREE BECAUSE THERE WAS AFFIRMATIVE EVIDENCE THAT THE DEFENDANT FORCIBLY RAPED THE VICTIM BUT DID NOT FELONIOUSLY ENTER HER RESIDENCE.

In order to instruct a jury on a lesser included offense, the court must satisfy the two-prong test established in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978). "First, each of the elements of the lesser included offense must be a necessary element of the offense charged." Second, the evidence in the case must support an inference that the lesser crime was committed." Id., at 447 – 448. Eaglespeaker does not contest that the first prong of the test is satisfied here, but claims only that the State did not satisfy the second, factual prong.

To satisfy the factual prong of Workman, there must be some affirmative proof that the defendant committed only the lesser crime. State v. Fowler, 114 Wn.2d 59, 785 P.2d 808 (1990). Furthermore, affirmative evidence requires something more than

the possibility that the jury could disbelieve some of the State's evidence. Id., at 67.

Eaglespeaker cites State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995), which dealt with a similar issue. In that case the court found that the trial court erred in giving the lesser included offense instruction of rape in the second degree. Eaglespeaker claims the cases are indistinguishable. In Brown, the State alleged rape in the first degree, via forcible compulsion and use or threatened use of a deadly weapon. The evidence of forcible compulsion and use of a deadly weapon was the victim's testimony that she'd been threatened with a gun. The Washington Supreme Court in Brown found that neither party had presented evidence that would support the conclusion that Brown raped the victim but did not use a deadly weapon, and that impeachment evidence that that serves only to discredit the State's witness but does not itself establish that only the lesser crime was committed cannot satisfy the factual prong of Workman. State v. Brown, 127 Wn.2d 749, 755, 903 P.2d 459 (1995).

The record in this case does contain affirmative evidence that Eaglespeaker could have committed only the lesser included crime of rape in the second degree, and that he did not enter the

residence of Ms. Ricciardi feloniously. First, in applying the factual prong, the court must view the supporting evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000). So if the State presented evidence from which a jury could infer that Eaglespeaker may have had permission to enter the residence, or was let into the residence, but later forcibly raped Ms. Ricciardi, then the trial court properly instructed the jury on the lesser included offense of rape in the second degree.

During the conference regarding the instructions, the trial court found, and Mr. Eaglespeaker agreed that the jury might find that he was invited or had an open invitation to enter the residence. RP (May 14, 2013) 119. While Eaglespeaker apparently objected to the lesser included instruction, the reason for the objection was clearly the possibility of an inconsistent verdict where the jury might find that Eaglespeaker committed the crime of burglary first degree and rape second degree, finding felonious entry in one count and not finding it in the other. CP 103 – 107.

In fact the State did present evidence that Mr. Eaglespeaker may have had permission to enter the residence. The extended text conversation between Eaglespeaker and Ricciardi that

occurred the evening prior to the rape gave the impression that Ricciardi was expecting Eaglespeaker to come to her residence. That same text conversation suggests that Eaglespeaker was interested in a sexual relationship with Ricciardi, but that she was not. The jury certainly could have, and likely did interpret that conversation as giving Eaglespeaker the implied authority to enter the residence. RP (May 14, 2013) 36 – 44. In particular the following part of the exchange suggests the inference that Eaglespeaker had permission to come to the house, but not for sex [RP (May 14, 2013) 36-45]:

Eaglespeaker: "I'm waking up, U up, sorry?"
And then
"I just woke up. I'll be over in a few."
"I need to shower, WBU?" [What about you?]

Ricciardi: "Yeah, but I always wait until my kids are asleep."

Eaglespeaker: "Okay, well if you want me to come over then let me know."
Then a while later,
"You up still?"

Ricciardi: "Yep, kids just fell asleep."

This text exchange happened after Eaglespeaker had stopped by twice before, that evening, during an argument between Ricciardi and her boyfriend, and was started by Ricciardi with the opening text: "Why are you ignoring me?" RP (May 14, 2013) 37. The jury could have inferred from that evidence/testimony that Ricciardi wanted Eaglespeaker to come to her house, but did not want to have sex with him, as much of the other texts involved an argument between Ricciardi and Eaglespeaker about whether the only reason he wanted to spend time with her was for sex. RP (May 14, 2013) 37-45.

There is significant other testimony that Eaglespeaker and Ricciardi had a friendly relationship, that she was used to him coming to her residence, and that she trusted him enough to loan him her vehicle. Ricciardi testified that she did not recall if she locked her door before going to sleep the night of the rape. RP (May 14, 2013) 93 - 94. Eaglespeaker told Deputy Hepner that Ricciardi let him into the house and wanted to take a shower with him. RP (May 14, 2013) 107 – 109.

Because the trial court correctly found that the State had presented affirmative evidence from which the jury could have

inferred that Eaglespeaker did not enter the residence feloniously, and so could have committed just the crime of rape in the second degree, and not rape in the first degree, it properly instructed the jury on the lesser included crime of rape in the second degree.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING IN EVIDENCE, UNDER THE "EXCITED UTTERANCE" EXCEPTION TO THE HEARSAY RULE, A RECORDED 9-1-1 CALL MADE BY THE VICTIM MS. RICARDI.

A. SINCE THE COMPLAINING WITNESS MS. RICARDI TESTIFIED AT TRIAL, THERE WAS NO CONSTITUTIONAL VIOLATION OF EAGLESPEAKER'S RIGHT TO CONFRONT WITNESSES.

A criminal defendant has a right "to be confronted with the witnesses against him," U.S. Const., Amendment VI. However, this amendment does not bar hearsay testimonial statements made by a witness who in fact testifies at trial. See State v. Crawford, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.).

This is true at minimum where the declarant testifies as to the relevant evidence which will be the case here. See dicta in

State v. Williams, 137 Wn. App. 736, 745, 154 P.3d 322 (2007), quoting State v. Rohrich, 132 Wn. 2d 472, 475, 939 P.2d 697 (1997) ("The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses....").

Since in this case, the complaining witness, Julie Riciardi, testified for the State at trial, RP (May 14, 2013) 22 – 81, and was cross-examined, RP (May 14, 2013) 81 – 103, there is no Constitutional bar to the admission of her hearsay statements.

B. THE 9-1-1 CALL FROM JULIE RICIARDI WAS PROPERLY ADMITTED UNDER THE "EXCITED UTTERANCE" EXCEPTION TO THE HEARSAY RULE.

The morning of 12/21/12, Julie Riciardi called 9-1-1 to request help after she'd been raped the day before. The jury was allowed to hear the recording of this phone call, RP (May 14, 2013) 76 – 79. Eaglespeaker argues that the trial court abused its discretion in admitting the 9-1-1 call Julie Riciardi made the day after the rape because she did not remain continuously under the stress of the rape. Brief of Appellant at 14.

However, a 9-1-1 call is admissible under ER 803(a)(2), which provides a hearsay exception for:

[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

ER 803(a)(2) permits statements "made while under the influence of external physical shock" to be admissible if made "before the declarant has time to calm down enough to make a calculated statement based on self interest." State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

The three requirements to satisfy the "excited utterance" exception are:

First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement related to the startling event or condition.

State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The basic premise of the rule is that the speaker has no opportunity to lie before making the utterance. State v. Briscoeray, 95 Wn. App. 167, 172, 974 P.2d 912 (1999), review denied, 139 Wn.2d 1011, 994 P.2d 848 (1999).

The passage of time between the startling event and the declarant's statement is only one factor to be considered in determining whether the statement is an excited utterance. State v. Strauss, 119 Wn.2d 401, 416-417, 832 P.2d 78 (1992), citing State v. Woodward, 32 Wn. App. 204, 206-207, 646 P.2d 135 (1982), review denied, 97 Wn. 2d 1034 (1982), superceded by statute as stated in State v. Ramirez, 46 Wn. App. 223, 230-231, 730 P.2d 98 (1986).

The passage of time alone is not dispositive. State v. Thomas, 46 Wn. App. 280, 284, 730 P.2d 117 (1986), aff'd., 110 Wn.2d 859, 757 P.2d 512 (1988). The key is

whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.

Johnston v. Ohs, 76 Wn.2d 398, 406, 457 P.2d 194 (1969).

Washington courts have allowed statements made hours after the startling events.¹

¹See, for example, State v. Flett, 40 Wn. App. 277, 287, 699 P.2d 774 (1985)(statements made 7 hours after the event admissible "based on the continuing stress experiences and exhibited by the victim"); State v. Fleming, 27 Wn. App. 952, 955-956, 621 P.2d 779 (1980), review denied, 95 Wn.2d 1013 (1981), disapproved on other grounds, State v. Osborn, 59 Wn. App. 1, 7, 795 P.2d 1174 (1990)(three to four hour delay).

In Strauss, a statement made to a police officer three and one half hours after a sexual assault was upheld as an excited utterance, 119 Wn.2d at 416-417. There the court noted the victim was crying and upset at the time she gave the statement and appeared to be in a state of shock. Id. at 416.

In Thomas, a statement made six to seven hours after a sexual assault was upheld as an excited utterance, 46 Wn. App. at 283-285. The Thomas court relied on the fact the victim was upset and crying, and her responses were not the product of leading questions. Id. at 285. The Thomas court also noted that "[w]hile several hours elapsed prior to the call, several of them were spent sleeping in the home of the alleged perpetrator." Id.

In order to qualify as an excited utterance, the startling event or occurrence need not immediately precede the statement. "Although the statement must be made while the declarant is still under the influence of the event, an excited utterance need not be contemporaneous to the event." State v. Robinson, 44 Wn. App. 611, 615-16, 722 P.2d 1379 (1986), review denied, 107 Wn.2d 1009 (1986), citing State v. Doe, 105 Wn.2d 889, 893, 719 P.2d 554 (1986). Timing is a relevant factor, however. State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992).

Responses to questions may be admissible. Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 369, 966 P.2d 921 (1998), citing Robbins v. Greene, 43 Wn. 2d 315, 321, 261 P.2d 83 (1953). In fact, declarations have been found to be admissible even when there is intervening conversation with others. In State v. Majors, statements made to a police officer 20 minutes after an assault were properly admitted as excited utterances even though the victim had previously spoken to other witnesses and to the 911 operator, 82 Wn. App. 843, 848-849, 919 P.2d 1258 (1996), review denied, 130 Wn.2d 1024, 930 P.2d 1230 (1997). The court noted that the ruling was based on victim's "'visibly shaken' demeanor, her youth, and the relatively small amount of time between the incident and the declaration." Id. at 848.

Here, while a little more than 24 hours had elapsed between the rape and the 9-1-1 call to law enforcement,² Julie Riciardi spent the intervening time terrified that Eaglespeaker would return and

² In United States v. Napier, 518 F.2d 316, 317-318 (9th Cir. Or. 1975), cert. denied, 423 U.S. 895, 96 S. Ct. 196, 46 L. Ed. 2d 128 (1975), the United States Court of Appeals for the Ninth Circuit (Oregon) upheld the admission of an excited utterance made when the declarant viewed a photograph of her assailant approximately eight weeks after the assault and cried out, "He killed me, he killed me." The Court ruled in that case, however, that the required startling event was the display of the photograph. Id. at 318. In State v. Ramirez-Estevez, 164 Wn. App. 284, 292, 263 P.3d 1257 (2011), review denied, 173 Wn.2d 1030, 274 P.3d 374 (2012), the Washington Court of Appeals rejected a comparison to Napier

assault her again. In fact, Eaglespeaker did return to Ricciardi's home 4-5 hours after the rape, which shocked her, as she initially didn't believe that he'd return. RP (May 14, 2013) 57 – 61. Later, Eaglespeaker continued to make threats against Ricciardi. RP (May 14, 2013) 70 – 74. Evidence that Ricciardi continued to be under the influence of the rape was that she asked others to stay with her to protect her from Eaglespeaker. RP (May 14, 2013) 75. Her behavior was consistent with someone who continued to be under the influence of the startling event of the rape.

When Ricciardi learned that Eaglespeaker would likely be staying at his place near her in North Bonneville, she became even more agitated and emotional. Ruanna Johnson, who had repeated contact with Ricciardi between the time of the rape and the 9-1-1 call described her as "frantic" and "hysterical" prior to making the call. RP (May 13, 2013) 143 - 148. Her demeanor on the 9-1-1 call corroborated the fact that she was still under the influence of the event, in that she was hard to understand. RP (May 14, 2013) 76 – 79. When the trial court listened to Ricciardi's demeanor on the 9-1-1 call it found that the foundational requirements had been met. RP (April 5, 2013) 5 – 6. Deputy Christian Lyle contacted Ricciardi

with respect to a two-year delay, stating, "The two-year delay here . . . eclipses

soon after the 9-1-1 call and also described her as hysterical and emotional, and was crying so much that he couldn't understand her at first. RP (May 13, 2013) 65 – 66.

Because there is ample evidence that Ricciardi continued under the influence of the startling event of the rape, even after the 9-1-1 call, her statements to law enforcement on that call therefore meets the foundational requirements for an excited utterance.

C. THE ADMISSION OF EXCITED UTTERANCES IS NOT REVERSED UNLESS THE TRIAL COURT ABUSES ITS DISCRETION.

The admission of "excited utterances" will not be reversed unless the trial court has abused its discretion. Strauss, 119 Wn.2d at 417 (1992). A trial court abuses its discretion when it acts on untenable grounds or for untenable reasons or when its decision is manifestly unreasonable. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), superceded on other grounds, Seattle Times Co. v. County of Benton, 99 Wn.2d 251, 263, 661 P.2d 964 (1983).

Since the trial court had tenable grounds to admit Ricciardi's 9-1-1 call, and its decision was not manifestly unreasonable, its

the eight-week delay in Napier.

ruling allowing the evidence to be admitted should not be disturbed on appeal.

The statement here is distinguishable from the one rejected as an excited utterance in State v. Brown, 127 Wn.2d 749, 757-759, 903 P.2d 459 (1995), cited in Brief of Appellant at 21-22, because in Brown, the trial court admitted a 911 call, part of which the declarant admitted during her testimony was false, id. at 753. No such thing happened here. In fact, Eaglespeaker misrepresents the trial testimony when he suggests Ricciardi lied in the intervening period between the rape and the 9-1-1 call. In fact Ricciardi's merely attempted to keep from Eaglespeaker the fact that she'd disclosed to others that he'd raped her. That's self-preservation, not a lie. [Eaglespeaker inexplicably cites RP (May 14, 2013) 68 – 70, 88, 90 for the proposition that Ricciardi lied.] For these reasons, the trial court did not abuse its discretion in admitting the 9-1-1 call.

D. EVEN IF THE THE VICTIM'S 9-1-1 CALL WAS IMPROPERLY ADMITTED, ANY ERROR WAS HARMLESS.

Even if the trial court did wrongfully admit the 9-1-1 call of Julie Ricciardi, the error was harmless. "An error in admitting

evidence that does not result in prejudice to the defendant is not grounds for reversal." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997), overruled on other grounds, State v. Sledge, 83 Wn. App. 639, 922 P.2d 832 (1996) [citation omitted].

Non-Constitutional violations of an evidentiary rule are "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred," Id., quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.

Id. [citation omitted]

Here, Julie Ricciardi testified in far more detail than what was on included in the 9-1-1 call, so the admission of the 9-1-1 call could not have materially affected the guilty verdict. Similarly, in Majors, 82 Wn. App. at 848-849, the Court of Appeals did not find an abuse of discretion in the admission of an excited utterance partially because the statement was "cumulative of other testimony," including that of the declarant.³ The admission of the 9-

³ The Court of Appeals also based this ruling "particularly because this was a bench trial in which the court is presumed to give evidence its proper weight," Id.

1-1 call was insignificant in the context of the evidence as a whole, including the admissions of Eaglespeaker to law enforcement as well as the statements he made via text message and phone calls overheard by Ruanna Johnson.

4. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT WHERE THOSE STATEMENTS WERE MADE PRIOR TO THE DEFENDANT BEING PLACED IN CUSTODY, WERE NOT IN RESPONSE TO INTERROGATION, OR WERE MADE SUBSEQUENT TO MIRANDA WARNINGS BEING GIVEN, AND WHERE THE DEFENDANT DID NOT MAKE AN UNEQUIVOCAL AND UNAMBIGUOUS REQUEST FOR AN ATTORNEY.

Eaglespeaker contends that he was in custody and requested an attorney when he was questioned by Deputy Manning and Detective Tim Garrity and that his initial statements denying sexual contact with Julie Ricciardi should not have been admitted in his trial. Brief of Appellant at 25. The trial court made proper findings of fact and conclusions of law regarding Eaglespeaker's statements to law enforcement at a CrR 3.5 hearing. CP 108 – 117. The trial court found that Eaglespeaker was not in custody at the time he was initially contacted by law enforcement and was placed in handcuffs. CP 15 (Conclusion of Law VII and X). The first statements to law enforcement were also not made in response to interrogation. CP 15 (Conclusion of Law VIII and XI). The initial

statements made by Eaglespeaker that the trial court found admissible were innocuous and not inculpatory. CP 111 (Finding of Fact 32, 35 – 39, 43). The later statements were all made subsequent to Miranda warnings being given and Eaglespeaker waiving his rights and choosing to speak with the officers. CP 111 – 112 (Findings of Fact 48 – 54). At the conclusion of the CrR 3.5 hearing, the defendant agreed that his statements to law enforcement (prior to being formally arrested and taken to jail) should be admitted under CrR 3.5. RP (March 28, 2013) 65-66.

a. THE DEFENDANT DID NOT MAKE AN UNEQUIVOCAL REQUEST FOR AN ATTORNEY.

A suspect's request for counsel must be unequivocal. A suspect must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350 (1994). A request is equivocal if further questions are needed to determine if the suspect has made a request. State v. Smith, 34 Wn. App. 405, 661 P.2d 1001 (1983). An officer who is confronted with an equivocal or ambiguous request for counsel may simply

proceed with questioning. Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350 (1994).

In this case, Eaglespeaker's comment to Deputy Manning and Detective Garrity was clearly ambiguous *and* equivocal. "I know my father has an attorney. Maybe I should call my dad." CP 111 (FFCL, finding of fact #43). In Davis v. U.S. the suspect's statement "maybe I should talk to a lawyer" was found to be ambiguous. Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350 (1994). See also, United States v. Fouche, 776 F.2d 1398 (9th Cir. 1985); United States v. Doe, 170 F.3d 1162 (9th Cir. 1999).

Eaglespeaker's statement is all the more ambiguous as he does not even indicate that he might want to talk to a lawyer, but rather, call his father. CP 111. Even though Eaglespeaker's comment was clearly ambiguous and equivocal, Deputy Manning still took the time to read Eaglespeaker Miranda warnings and remind him of his rights. Eaglespeaker agreed that he understood his right to remain silent and his right to an attorney, and he still wanted to talk to Detective Garrity. CP 111-112. All of the incriminating statements made by Eaglespeaker, including his initial denial of having any sexual contact with Ricciardi at all, occurred subsequent to his

knowing and intelligent waiver of his rights after being read Miranda warnings. CP 116 (Conclusions of Law XIV).

Eaglespeaker also contends that the Washington Constitution Article I, Section 9 provides greater protection than the Fifth Amendment to the U.S. Constitution. It is settled law that the U.S. Constitution and the Washington Constitution provide similar protections. State v. Russell, 125 W.2d 24, 882 P.2d 747 (1994).

b. EAGLESPEAKER WAS NOT IN CUSTODY WHEN HE WAS DETAINED BY DEPUTY MANNING DURING THE PROTECTIVE SWEEP OF HIS RESIDENCE AFTER THE 9-1-1 HANG-UP CALL.

Custody, for the purposes of whether Miranda warnings are required, means the suspect has been placed under arrest, or his freedom of movement has been curtailed to a degree associated with formal arrest. Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984). State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986). When Eaglespeaker was contacted by Deputy Manning he was initially detained for the purpose of officer safety, and while he was placed in handcuffs, he was not arrested, and was contacted at his residence, and not removed to a more secure facility. The detention was more similar to a Terry detention than formal arrest. CP 108 – 117.

Because Eaglespeaker was read Miranda warnings and freely waived his rights, and because Eaglespeaker did not make an unambiguous and unequivocal request for counsel, the statements he made to law enforcement were properly admitted in his trial.

5. THE TRIAL COURT PROPERLY FOUND THAT EAGLESPEAKER WAS OR WOULD BE CAPABLE OF PAYING HIS LEGAL FINANCIAL OBLIGATIONS WHEN IT CHECKED THE BOX UNDER SECTION 2.5 OF THE JUDGEMENT AND SENTENCE "THAT THE DEFENDANT HAS THE ABILITY OR LIKELY FUTURE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS IMPOSED HEREIN."

By checking the box on the Judgment and Sentence the sentencing judge made the findings required by RCW 10.01.160(3). If the court should decide that such a finding on the Judgment and Sentence is insufficient, the issue should be remanded to the trial court to make the proper findings, rather than strike the costs imposed.

D. CONCLUSION

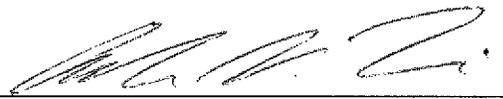
The trial court properly instructed the jury on the lesser included offense of rape in the second degree. The trial court did not abuse its discretion in admitting the 9-1-1 call as an excited utterance exception to the hearsay rule. The trial court also properly admitted the statements

Eaglespeaker made to law enforcement as they were subsequent to Miranda warnings and a knowing and intelligent waiver of his rights, and because he did not make an unambiguous or unequivocal request for counsel. Because none of these were error, there is no cumulative error, and therefore this Court should affirm Eaglespeaker's guilty verdict.

DATED this 5th day of September, 2014

RESPECTFULLY submitted,

By:



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September 5, 2014, City of Stevenson, Washington

SKAMANIA COUNTY PROSECUTOR

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